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Supreme Court of the United States

October Term, 1953

No. 276

WOODRUFF L. CLARK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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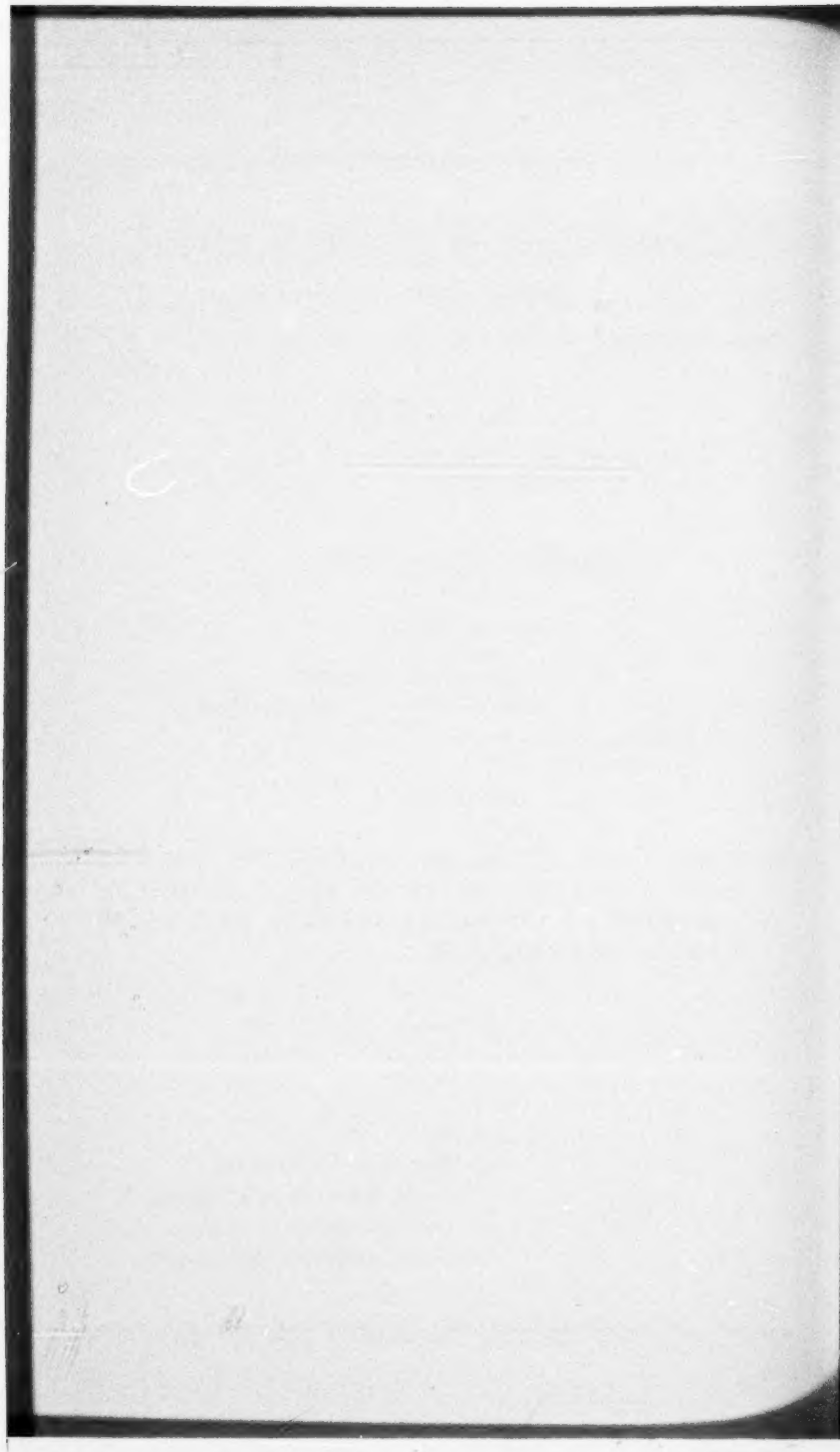

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Supreme Court of the United States

October Term, 1953

No.

WOODRUFF L. CLARK,
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vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Woodruff L. Clark respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which Court by opinion affirmed the judgment and sentence of the United States District Court for the District of Columbia under an indictment charging violation of Section 1341, Title 18, U.S.C. (June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.).

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 9-12) was rendered

on July 23, 1953, the Justices sitting on the case being E. Barrett Prettyman, Henry W. Edgerton and George Thomas Washington. The opinion was written by Judge E. Barrett Prettyman.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

The Petitioner contends that the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia violates his rights under the Fifth and Sixth Amendments to the Constitution of the United States, and Title 18 U.S.C. Section 3282, (June 25, 1948, c. 645, 62 Stat. 828) and each of them erred in their construing of the Constitutional guarantees and the Statutes involved in the case.

STATEMENT OF THE CASE

The Petitioner in a trial beginning and ending on November 3, 1952 was tried in the United States District Court for the District of Columbia on an indictment containing four counts in each of which he was charged with violation of Title 18, Section 1341, U.S.C., which is otherwise known as the Mail Fraud Section. (R. 2A-8A).

Following the indictment and prior to trial Motion to Dismiss the indictment was filed on behalf of the Defendant predicated on the fact that the conversion was accomplished by the defendant in April and May, 1941, and that therefore the specific fraud made the basis of the

indictment was accomplished completely in April and May, 1941. Such being the case it was the contention of the Defendant that the prosecution was barred by the Statute of Limitations because the letters in 1950 and 1951 could not be and were not in furtherance of a fraud completely accomplished in 1941. The Motion to Dismiss the indictment was denied without prejudice so as to permit of the matter being raised at the trial at the end of the prosecution's case.

The trial, by consent of parties, was had by the Court without jury and on a stipulated set of facts. (Tr. 25).

The facts stipulated were to the effect that the Defendant was District Manager for the Continental Life Insurance Company in Washington, D. C. in April and May, 1941; that Ruth K. Dixon was the beneficiary of two insurance policies written by the Continental Life Insurance Company on the life of her husband who died April 2, 1941; that the Defendant suggested to Mrs. Dixon that she reinvest the proceeds of the insurance ($3398.94) and a smaller additional amount ($101.06) totaling $3500.00, with the Continental Life Insurance Company; that the Defendant received this amount of money and converted it to his own use at that time; that by the terms of an investment agreement which the Defendant gave to Mrs. Dixon bearing the forged signature of the authorized signatory of the Company, Mrs. Dixon was to receive semi-annual interest checks on May 1 and December 1; that the Defendant did send to Mrs. Dixon Cashier's Checks which he purchased with his own funds and delivered them to her personally; that in 1943 the Defendant's employment with the Company was terminated, at which time no disclosure of Mrs. Dixon's $3500.00 was made; that in 1945 Mrs. Dixon decided to withdraw some or all of the "invested" funds but that the Defendant dissuaded her and convinced her she should sell her War Bonds instead; that the Defendant told Mrs. Dixon following his

separation from the Continental Life Insurance Company in 1943 that he would like to handle the payment of interest instead of it coming directly from the Company because he got some slight commission for his work in this regard; that in 1950 Mrs. Dixon moved to Florida and the semi-annual checks were not regularly received; that she wrote to the Defendant inquiring as to the delay and advising that she was going to take the matter up with the Continental Life Insurance Company direct. The four letters which are respectfully made the basis of the four different counts of the indictment are what the Defendant mailed from the District of Columbia in answer to her letters, which letters of the Defendant were dated respectivly, May 29, 1950, Dcember 20, 1950, January 31, 1951 and April 23, 1951.

Prior to the receipt of the fourth letter Mrs. Dixon had contacted the Continental Life Insurance Company and was advised for the first time that there was no investment agreement with that Company. As indicated above the stipulated fact was that the Defendant had in fact converted the $3500.00 to his own use at the time of receipt in April and May, 1941.

On the stipulated facts as above, the Defendant through his counsel, moved for a Judgment of Acquittal. The Court heard argument of counsel for the Defendant and the prosecution, and then took the matter under advisement. On December 5, 1952, the District Court denied the Motion for Judgment of Acquittal and made a finding of guilt on all four counts.

The Defendant in proper time under the rules, filed a Motion for Judgment of Acquittal Non Obstante Veredicto and/or Motion for New Trial.

The foregoing Motions were argued before the trial court and the same were taken under advisement and then overruled.

On January 23, 1953, the Court sentenced the Defendant to 1 to 3 years on each of the four counts of the indictment, said sentence to run concurrently.

SUMMARY OF ARGUMENT

The trial court erred in denying Petitioner's Motion for Judgment of Acquittal for two reasons:

1. The prosecution was barred under Section 3282, Title 18, U.S.C. (June 25, 1948, c. 645, 62 Stat. 828).

2. The prosecution was not authorized in law even if brought in 1941 or within three years thereafter because the mails were only used after completion of the alleged fraud.

ARGUMENT

The stipulated facts in this case indicate that in April and May, 1941 the Continental Life Insurance Company drew two checks aggregating $3500.00 and payable to Ruth K. Dixon, the same being payment of policies of insurance held on her husband who had died. The stipulated fact further is to the effect that both of these checks were turned over by Mrs. Dixon to the Defendant with authority to reinvest same with the insurance company. The further stipulated fact is that on receipt of the checks in April and May, 1941 the Defendant then and there at the same time converted the proceeds of said checks to his own use.

The prosecution notwithstanding its agreement by way of stipulation that the conversion or defrauding as same was alleged in the indictment, was accomplished in 1941 sought to support the prosecution under Section 1341, Title 18, U.S.C. on the theory that the letters written by the Defendant in 1950 and 1951 and made a part of the

respective four counts in the indictment brought the prosecution within the three year statutory period of limitations.

It is to be borne in mind under the stipulation that between June, 1941 and May 29, 1950, the date of the first letter set forth in the indictment, nothing was done by the Defendant that would sustain any theory of use of the mails in a scheme to defraud.

Attention of the Court is first directed to the case of *U. S.* vs. *Ames,* 39 F.Supp. 885, where it is pointed out that the offense was to be regarded as having been committed when the fraudulent statements were made and deeds and contract delivered.

It is urged to the Court that the offense in the instant case was committed when the defendant supposedly falsely represented as to the reinvestment of the money and as a result thereof obtained the said money and converted it to his own use during April, May and June, 1941.

In the case of *U. S.* vs. *Proctor and Gamble Company,* 47 F.Supp. 676, a prosecution under the Mail Fraud Statute, the Court ruled that the prosecution was barred by the three year Statute of Limitations insofar as substantive offense charges were concerned.

It is to be borne in mind that the four counts in the instant indictment charge substantive violation of the Mail Fraud Statute.

The prosecution relied on the following cases:

Stewart vs. *U. S.,* 119 Fed. 89,
Freeman vs. *U. S.,* 244 Fed. 1,
U. S. vs. *Speilberger,* et al, 28 F.Supp. 380,
Lewis, et al vs. *U. S.,* 38 F.2d 406,
Bogy and Spaulding vs. *U. S.,* 96 F.2d 734,
Davis vs. *U. S.,* 125 F.2d 144,
U. S. vs. *Riedel,* 126 F.2d 81,

as bringing this case by virtue of the letters within the three year limitation period. It is urged by the prosecution that these letters are what may be designated as "lulling letters".

It is of interest to note that in the *Riedel* case (supra), cited by the prosecution, it is pointed out that the words of the statute "in furtherance of" can be established only when the scheme is still in existence. The case further states the rule of law to be:

> "If the scheme to defraud was over or had been abandoned there could be no use of the mails *in furtherance of* it. (Emphasis supplied)
> "The words 'in furtherance of' as applied to the scheme may be established only when the scheme is still in existence."

Defendant suggests to the Court again that the scheme to defraud was an accomplished situation in June, 1941 and therefore the letters in 1950 and 1951 could not be in furtherance of something long since accomplished.

The prosecution has given no thought to the fact that the letters instead of being "lulling letters" were in fact acts committed by the defendant "to hinder or prevent the apprehension, trial or punishment," for the conversion accomplished in 1941.

In this latter connection it is to be borne in mind that none of the cases cited by the prosecution gave any consideration to the fact that things can be done "after the fact" the purpose of which is to conceal criminal conduct or to prevent the fact of such conduct becoming known.

Title 18, Section 3, U. S. Code insofar as pertinent here reads as follows:

> "Accessory after the fact.
> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or

prevent his apprehension, trial or punishment, is an accessory after the fact. * * * (June 25, 1948, c 645 1, 62 Stat. 684)"

Title 22, Section 106, D.C. Code (1951 ed.) on the same subject provides as follows:

"Accessories after the fact.

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than twenty years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment or both, as the case may be, not more than one-half the maximum fine or imprisonment, or both, to which the principal offender may be subjected. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, §909.)"

Certainly the prosecution will not contend that acts that would be deemed "after the fact" as contemplated under both the Federal and District of Columbia Codes (supra) insofar as a person other than the perpetrator of the main crime would not be acts "after the fact" when performed by the person who perpetrated the main crime.

Attention of the Court is directed to Paragraph 1 of Count 1 of the indictment (R. 2A), and which paragraph is made part of each of the four counts by reference and which reads as follows:

"1. In about April 1941, and continuously thereafter to the time of the filing of this indictment in Court, the defendant, Woodruff L. Clark devised and intended to devise a scheme and artifice to defraud Ruth K. Dixon and for obtaining her money and property by falsely pretending, representing and promising to her that if she would deliver her money and property to him, he, the defendant, who was in April, May and June, 1941 District Manager of the Continental Life Insurance Company in the territory of the District of Columbia, would invest the money and property so delivered to him with that Company for the benefit of Ruth K. Dixon; it being the intention of the defendant

at the time the false pretenses, representations and promises mentioned would be made not to invest the money and property as promised, but fraudulently to convert it to his own personal use."

There is no allegation in this Paragraph which is the charging part of each Count of the indictment of a scheme after conversion to lull the complainant into a sense of security or to deceive the said party as to the fact of conversion. This charging portion of the indictment alleges a scheme to defraud which scheme was an accomplished fact with nothing further to be done to promote its accomplishment as of June, 1941.

On the very theory that is charged in the indictment there is set forth the allegation that "at the time of the false presenses, representations and promises mentioned would be made not to invest money and property as promised, but fraudulently to convert it to his own personal use." (R. 2A).

The stipulation discloses that the situation was complete, namely, that he did not have the intention to invest and moreover that the defendant fraudulently converted it to his own personal use in 1941. (R. 25)

The cases cited by the prosecution do not apply for the reasons already suggested, namely, that the scheme to defraud was already accomplished at the time of the mailings and that the mailings were merely acts by the defendant to conceal the fraud already accomplished and such mailings, therefore, must be considered only as *"after the fact"*.

That the Motion for Judgment of Acquittal is based on a sound conception of the law is clearly illustrated in the case of *Kann* vs. *U. S.*, 323 U.S. 88, 89 L.Ed. 88, wherein a conviction for violation of the Mail Fraud Statute, coming from the Maryland Federal District, was reversed.

Mister Justice Roberts, writing the opinion of the Court, pointed out:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

In the same case Justice Roberts also stated that:

> "Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated."

Subnote to this statement by Justice Roberts points to some of the very cases relied on by the prosecution.

It is interesting to note in this same case as pointed out by Justice Roberts at page 95 of the opinion that the prosecution therein urged that the scheme was not complete and in connection therewith the Justice stated as follows:

> "But, even in that view, the scheme was completely executed as respects the transaction in question when the defendants received the money intended to be obtaind by their fraud, and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it."

Surely the above language of Justice Roberts is most applicable to the situation in this case, for the fact is that "* * * the scheme was completely executed * * *" as in the *Kann* case (supra). In the instant case we do not have transactions but rather one transaction accomplished nine years before the use of the mails and the undisputed fact that in the interim of nine years no use of the mails is charged.

In the *Kann* case (supra) there is no situation of where the defendants knew that the checks would be dishonored and in this case there was no link in the chain that remained after the appellant obtained the money and converted it to his own use in 1941.

The Court's attention is directed to the fact that in the *Kann* case (supra) Mister Justice Douglas, writing the dissent offered only one case in support of his position, that being *Decker* vs. *U. S.* (C.C.A. 4th) 140 F.2d 378, 379. This is one of two cases involving the same defendant decided by the 4th Circuit on the same day, January 21, 1944. The other *Decker* case is reported in the same volume, 140 F.2d 375, and both cases grew out of the same investigation that brought forth the prosecution in the *Kann* case (supra). Incidentally, the *Kann* case (later reversed by the Supreme Court (supra) was decided also on January 21, 1944 and is reported in 140 F.2d 380. The *Decker* case (supra) referred to by Justice Douglas in his dissent in the Kann case (supra) involved alleged violation of the Mail Fraud Statute as in the instant case. The other *Decker* case (supra) was a prosecution for alleged violation of the Sixth Supplemental National Defense Appropriations Act of 1942, 50 U.S.C.A. App. Sec. 1191 (e). The reports indicate that no application for certiorari was made in either of the *Decker* cases (supra).

The reasoning of Justice Roberts in the *Kann* case (supra) is in nowise changed by the decision of the Supreme Court in *U. S.* vs. *Sheridan,* 329 U.S. 379, 393, 91 L.Ed. 359. In this case a prosecution for violation of Section 3 of the National Stolen Property Act (causing the transportation in Interstate Commerce of forged checks knowing them to have been forged) it is pointed out, that at the time that the defendant cashed the checks in Michigan he had in mind that the checks would have to be transported in Interstate Commerce before the fact

was ascertained that he had no such account in the bank located in Missouri.

In this latter connection the indictment in the instant case does not charge any further frauds after the accomplished conversion. (R. 2A). There is no evidence before the court that the defendant had in mind obtaining any more checks or other money in any form from the complainant or others.

In the case of *U. S.* vs. *McKay,* 45 F.Supp. 1001, a prosecution for using the mails in a scheme to defraud, it is pointed out at page 1005 that:

> "If the scheme charged was completed before the mail was used the offense denounced by Section 215 of the Criminal Code does not exist."

The referred to Section is the predecessor of the present Mail Fraud Section.

In the case of *Stapp et al* vs. *U. S.,* 120 F.2d 898, the Court states:

> "In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there, defrauded. Up to that point the mails had not been used at all. * * * The mailing of the letter from Fort Worth to Tyler was not in furtherance of the scheme and was not 'caused' by them. The facts do not support the convictions. Spillers v. United States, 5 Cir. 47 F.2d 893."

Also to the same effect is the case of *Dyhre* vs. *Hudspeth,* 106 F.2d 286. The Court says:

> "The fraud charged in each of these counts standing alone is not within the jurisdiction of the federal court, but it may be brought within that jurisdiction by charging that defendant used the United States mail 'for the purpose of executing such scheme or

artifice or attempting so to do'. That was charged here, but the charge clearly shows that the United States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

Again by way of repetition defendant suggests to the Court that under the theory of the prosecution and as well the explicit words of the indictment the prosecution is based on a scheme to defraud the complainant and the use of the mails in furtherance thereof. The conceded statement of facts clearly point to the fact that the scheme to defraud was accomplished and that the mailings referred to in the indictment played no part whatsoever in the fraud already accomplished.

See also:

Spillers vs. *U. S.*, 47 F.2d 893
Bauman vs. *U. S.*, 156 F.2d 534
Reining vs. *U. S.*, 167 F.2d 362
U. S. vs. *Citrim*, 58 F.Supp. 766
U. S. vs. *Kuiken*, 101 F.Supp. 929.

In the United States Court of Appeals for the District of Columbia Circuit the respondent in addition to cases previously suggested (supra) relied on the case of *Mitchell* vs. *U. S.* (C.C.A. 10) (1942), 126 F.2d 550, cert. den., 316 U.S. 702, Reh. den. 324 U.S. 887. It is urged to this court that the "lulling" theory advanced by the respondent is not sustained by any of these cases and particularly the *Mitchell* case (supra).

The *Mitchell* case (supra) at page 554, and quoting from *Mitchell* vs. *U. S.*, 118 F.2d 653, points out:

"• • • an entirely different situation is presented when the indictment charges, as it does here, that the

> scheme so devised was a continuing scheme which included as an essential element thereof the approval and recordation of the assignments of the leases sold, and the return of the same to the purchaser; and that the use of the mails was contemplated and were used to accomplish this purpose. (Cases cited) *Or where it is charged, as here, that the mails were used for the purpose of lulling the victims into a false sense of security to avoid apprehension.*" (Emphasis supplied).

The Court's attention is again directed to Count 1 of the indictment, (R. 2A) setting forth the charging portion for all counts of the indictment, a reading of which readily discloses that it is not charged that the mails were used for the purpose of lulling the complainant or any others into a false sense of security to avoid apprehension. The fact is that the transaction is an isolated one and it is not charged nor was there any evidence offered that this was more than an isolated transaction. It follows therefore that it cannot be contended under the charge contained in the indictment that the Appellant had in mind defrauding the complainant in other respects or other people in a manner similar to that followed in the instant isolated case.

The case of *Krulewitch* vs. *U. S.*, 336 U.S. 440, 443, points out that there cannot be additional conspiracies conceived as being contained within the indictment when such are not charged.

In the case of *U. S.* vs. *Rosenblum*, 176 F.2d 321, 332, the Seventh Circuit speaking through Circuit Judge Kerner stated:

> "The only possible basis for the consideration of such evidence on the conspiracy charge was the theory adhered to by some courts, see United States v. Krulewitch, 2 Cir., 167 F.2d 943, 948; United States v. Goldstein, 2 Cir., 135 F.2d 359; Murray v. United States, 10 F.2d 409 that there necessarily was an agreement among the alleged conspirators to conceal

the violation after as well as before the illegal plan is consummated. I believe this theory has now been definitely discarded. Krulewitch v. United States, 336 U. S. 440, 443, 69 S.Ct. 716."

The only possible basis for sustaining the conviction in the instant case would be that the indictment instead of charging as it does in fact actually charged a different scheme where it was alleged that the conduct complained of was a continuing one for the purpose of lulling the complainant into a sense of security with the view of further frauds either on her or others. Such is not the charge contained in this indictment.

The chart upon which this case must rest is the indictment here before the Court which charges the fact that the defendant had a scheme by misrepresentation to get the money of the complainant. The facts disclose that he accomplished this purpose and there remained nothing to be done through the mail or otherwise.

II.

Petitioner contends that even if this prosecution had been initiated in 1941 or within three years from June 1941 the prosecution in this instance would not be sound in law.

The charging part of the indictment (R. 2A) specifically and without equivocation declares the scheme to be the getting of the money by false pretenses and the conversion of same to the petitioner's own use.

Again it is urged that the scheme in its entirety was accomplished in June 1941 so that any subsequent acts by the defendant could not have been in furtherance of the scheme and were acts after the fact of the scheme to defraud and for all purposes not to further the fraud but to conceal the fraud.

The soundness of the respondent's position in this regard it is again urged is supported in the cases of *Krulewitch* vs. *U. S.* (supra), *U. S.* vs. *Rosenblum* (supra) and *Mitchell* vs. *U. S.* (supra).

The Petitioner would point out that the prosecutor stated to the Trial Court "the fraud was perpetrated in 1941". (Tr. 4). Moreover, the prosecutor repeatedly suggested to the Court that the fraud was completed in 1941. (Tr. 5, 8 and 25).

CONCLUSION

The foregoing considered it is urged to this Honorable Court that the indictment in this cause and the facts stipulated do not support a basis of conviction and that therefore the Motion for Judgment of Acquittal should have been granted by the trial court.

It is therefore contended that this Honorable Court should grant the Writ of Certiorari herein requested so that the contentions made can be fully considered and a determination had as to the legality of the conviction herein involved.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 276

WOODRUFF L. CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia is reported at 108 F. Supp. 388. The opinion of the Court of Appeals (R. 9-12) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1953 (R. 13). The petition for a writ of certiorari was filed August 20, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in connection with a scheme to defraud a beneficiary of life insurance proceeds by purportedly investing such proceeds with petitioner's company in 1941, letters written in 1950 and 1951 explaining the delay in interest payments constituted a use of the mails in the execution of such scheme.

STATUTE INVOLVED

The pertinent statute provides:

18 U.S.C. 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

A four-count indictment filed on July 1, 1952 (R. 2) in the United States District Court for the District of Columbia charged petitioner with violations of the Mail Frauds Act (18 U.S.C. 1341) (R. 2-8). The first paragraph of count one (R. 2-3) which is incorporated into the succeeding three counts (R. 4, 5, 6) provided as follows (R. 2-3):

> In about April 1941, and continuously thereafter to the time of the filing of this indictment in Court, the defendant, Woodruff L. Clark devised and intended to devise a scheme and artifice to defraud Ruth K. Dixon and for obtaining her money and property by falsely pretending, representing and promising to her that if she would deliver her money and property to him, he, the defendant, who was in April, May and June, 1941 District Manager of the Continental Life Insurance Company in the territory of the District of Columbia, would invest the money and property so delivered to him with that Company for the benefit of Ruth K. Dixon; it being the intention of the defendant at the time the false pretenses, representations and promises mentioned would be made not to invest the money and property as promised, but fraudulently to convert it to his own personal use.

Each of the four counts described one of four letters which were mailed May 29, 1950 (count 1) (R. 3-4), December 20, 1950 (count 2) (R. 4-5), January 31, 1951 (count 3) (R. 5-6), April 23,

1951 (count 4) (R. 6-7) and alleged that each letter was mailed for the purpose of executing said scheme. Petitioner waived jury trial (Tr. 1, 3-4, 8, 9) [1] and moved for a judgment of acquittal upon an oral stipulation of facts (Tr. 18, 28, 30). These facts are as follows (Tr. 25-27):

Upon the death of her husband in April, 1941, Mrs. Dixon as beneficiary received approximately $3500 from insurance policies on his life carried by Continental Life Insurance Company. Petitioner, who was at that time a district manager for the company in Washington, D. C. and who handled the claim for her, persuaded her to reinvest the money with the company through him. Under a purported investment agreement, which bore the forged signature of an authorized officer of the company, Mrs. Dixon was to receive three and one-half per cent interest on her investment, payable semi-annually. Pursuant to the agreement, Mrs. Dixon turned over the entire insurance proceeds to petitioner in April and May, 1941. Upon receipt of the money, petitioner converted it to his own use. However, for several years thereafter, petitioner delivered to Mrs. Dixon semi-annual interest as provided in the agreement. When petitioner severed his connection with the company in 1943, he advised Mrs. Dixon that he would continue to handle the interest payments himself because of some slight commission he would receive from such handling.

[1] The symbol "Tr." refers to the stenographic transcript of the trial proceedings.

Later, in 1945, Mrs. Dixon attempted to liquidate a part or all of her investment to purchase a house but petitioner persuaded her to keep the investment intact and liquidate her war bonds instead. When Mrs. Dixon moved to Florida in 1950, petitioner's checks to her became irregular. Thereupon, Mrs. Dixon wrote to petitioner inquiring about the delay and indicated that she would write to the company. Petitioner replied by sending her the four letters which are described in the indictment. These letters, dated in 1950 and 1951, *supra*, pp. 3-4, apologize for the delay in the interest payments and assure her that in the future they would be sent regularly. With the last letter, which was mailed April 23, 1951, petitioner enclosed a check covering one year's interest. Prior to that date, however, Mrs. Dixon learned of the fraud when she wrote to the company complaining about the delinquent payments.

On his motion for a judgment of acquittal (Tr. 18, 28, 30), petitioner contended that his scheme to defraud Mrs. Dixon was completely terminated in 1941 when he converted her money to his own use, and that the letters mailed in 1950 and 1951, upon which the Government relied to bring the violation within the three-year period of the applicable statute of limitations (18 U.S.C. 3282), were not mailed in furtherance of petitioner's scheme to defraud Mrs. Dixon. The District Court denied the motion and sentenced petitioner generally to imprisonment for a period of from one to

three years (P. Tr. 6).[2] It held that although profit to petitioner from the scheme ended when he converted the funds in 1941, the scheme itself did not end as long as activity in connection with the scheme, such as the mailing of the interest payments, continued. Here, that activity continued at least through April 23, 1951 (Tr. 32-34). On appeal, the Court of Appeals affirmed the District Court's judgment (R. 13).

ARGUMENT

The decision below does not, as petitioner claims, depart from the principles laid down by this Court in *Kann* v. *United States,* 323 U.S. 88. The courts below recognized that under the *Kann* decision the mailing must be in execution of a scheme to defraud and that, if the scheme has been completed, a subsequent mailing is not sufficient to meet the requirement of the statute. Both courts below properly found, however, that on the facts of this case, the scheme had not been completed when the mailings occurred, and that the mailings were in execution thereof.

Petitioner argues that the scheme was complete when he converted the $3500 to his own use, but it is clear that the representation that the money was being invested and was bearing interest was part of the original scheme and necessary to enable petitioner to retain the funds. Therefore, as long as petitioner continued the interest payments, he was

[2] The symbols "P. Tr." refer to the preliminary transcript of the trial proceedings.

carrying out the scheme as originally planned. Accordingly, the letters set forth in the indictment relating specifically to the interest payments—one of them (count 4) including a check for the interest payment—were clearly and directly in furtherance of the scheme to defraud. See *United States* v. *Earnhardt,* 153 F. 2d 472, 474 (C.A. 7), certiorari denied, 328 U.S. 858; *Marshall* v. *United States,* 146 F. 2d 618, 620-621 (C.A. 9).

CONCLUSION

The question presented was correctly decided below. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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